

Dimick v. Donahue, Nos. 04-55461, 04-55473, 04-55546

JAN 30 2006

REED, District Judge, concurring in part and dissenting in part:

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

I concur in the conclusions of Part I of the memorandum disposition affirming the timeliness of Dimick's suit.

However, as to Part II, I question whether the amount of damages awarded by the district court adequately compensates Dimick for the wrongs he suffered from Donahue's breach of fiduciary duty, and I respectfully dissent from the majority. I conclude that the district court misapplied the law involving damages calculations, the choice of which we review *de novo*. See *Gayle Mfg Co., Inc., v. Fed. Sav. & Loan Ins. Corp.*, 910 F.2d 574, 578 (9th Cir. 1990). Furthermore, because the district court misapplied the law, the district court's calculation of damages presents clear error and its decision not to impose a constructive trust constitutes an abuse of discretion.

The district court stated that it chose to not base its damages calculation on the time of filing because doing so would have required "impermissible speculation and conjecture" as to when Dimick would have actually sold his stock and what the resulting amount would be. This statement indicates a misapplication of the doctrine of speculation. As stated by the California Supreme Court, the law which we apply in this diversity suit,

[a]lthough evidence to establish profits must not be uncertain or speculative, “[t]his rule does not apply to uncertainty as to the amount of the profits which would have been derived, but to uncertainty or speculation as to whether the loss of profits was the result of the wrong and whether any such profits would have been derived at all.”

Myers v. Stephens, 43 Cal. Rptr. 420, 431 (Cal. Ct. App. 1965) (quoting *Continental Car-Na-Var Corp. v. Mosley*, 198 P. 2d 9, 14 (Cal. 1944) (punctuation altered)). To the extent that the district court’s determination was influenced by a desire to avoid speculation in the amount of profits, that was error.

In addition, while I agree that a constructive trust to disgorge profits is merely an available equitable remedy, the district court appears to have misapplied the law in considering an equitable trust. The district court distinguished the instant case from cases which imposed constructive trusts by finding that those cases involved “malicious, willful breach[es],” whereas, here, Donahue did not wear “a black hat.” I find such a distinction to be without merit. California caselaw does not provide for degrees of maliciousness once a breach of trust has been found. A breach of trust indicates bad faith *per se*. See *Bennett v. Hibernia Bank*, 305 P.2d 20, 34 (Cal. 1956) (“Since a fiduciary has a duty to make a full

disclosure of facts which materially affect the rights of the parties, it seems obvious that any act by him amounting to a conversion of trust property is akin to a fraudulent concealment.”). While the ultimate imposition of a constructive trust is subject to the district court’s discretion, once the district court had found that Donahue had breached Dimick’s trust, it must have also found as a matter of law that the breach constituted bad faith and that any profits Donahue gained through the breach constituted unjust enrichment.

Thus, in misapplying the legal doctrines of speculation and constructive trust in its determination of damages and its consideration of equitable remedies, the district court clearly erred in the calculation of those damages, and its failure to properly consider the equitable remedy of constructive trust constituted an abuse of discretion. I would remand for reconsideration of these issues.